PETER D. KEISLER
Assistant Attorney General
VINCENT M. GARVEY
Deputy Branch Director, Federal Programs Branch
JOHN H. ZACHARIA (D.C. Bar # 456867)
Trial Attorney, Federal Programs Branch, United States Department of Justice
20 Massachusetts Avenue, NW, Seventh Floor
Washington, D.C. 20530
Telephone: (202) 305-2310
Facsimile: (202) 616-8470

KEVIN V. RYAN (CA Bar #118321)
United States Attorney
JOANN SWANSON (CA Bar #88143)
Chief, Civil Division
OWEN MARTIKAN (CA Bar #117104)
Assistant United States Attorney
450 Golden Gate Ave., Box 36055
San Francisco, CA 94102
Telephone: (415) 436-7200
Facsimile: (415) 436-6748

Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

BREWSTER KAHLE, INTERNET ARCHIVE, RICHARD PRELINGER, AND PRELINGER ASSOCIATES, INC., Plaintiffs, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States, Defendant.	**Case No. 04-CV-1127-MMC** **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** **Date: Friday, October 29, 2004** **Time: 9:00 a.m.** **Courtroom: 7, 19th Floor** **Judge: The Honorable Maxine M. Chesney**

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INTRODUCTION

Defendant's motion to dismiss and supporting memorandum ("Opening Memorandum" or "Op. Mem.") established that Plaintiffs' constitutional challenges to the most recent extension of copyright terms and to changes to the requirements for copyright renewal, notice, and registration should be dismissed. Plaintiffs' Opposition ("Pl. Opp.") confirms that Plaintiffs manifestly challenge Congress' policy determinations, even though the Supreme Court has repeatedly stressed "that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 212, 123 S. Ct. 769, 785 (2003). As the Supreme Court in *Eldred v. Ashcroft* noted, Congress' exercise of its Intellectual Property Clause authority in enacting the challenged copyright statutes is only subject to rational basis review by the courts. In their Opposition, Plaintiffs do not dispute that Congress had a rational basis for enacting each statute they challenge. Instead, Plaintiffs request the Court to subject the challenged statutes to heightened review under the "congruence and proportionality" standard, which the *Eldred* Court expressly *refused* to apply to copyright laws. 537 U.S. at 217-18; 537 U.S. at 788. Because Congress undisputedly had a rational basis for enacting the challenged copyright statutes, Plaintiffs' "Progress Clause" claim should be dismissed.

Further, the *Eldred* Court confirmed that a copyright extension that follows the 1976 Copyright Act's pattern of life-of-the-author plus a fixed number of years, such as the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) ("CTEA"), does not violate the Intellectual Property Clause's "limited Times" constraint. *Eldred*, 537 U.S. at 204, 222, 123 S. Ct. at 781, 790. Plaintiffs base their claim that the CTEA's term is "effectively perpetual" on the erroneous premise that, as a matter of law, a copyright term is measured by the *economic value* of a work after the copyright term expires, not by the *time* it takes for the term to expire. Plaintiffs concede that the *Eldred* Court observed that "[i]t is doubtful, however, that those architects of our Nation, in framing the 'limited Times' prescription, thought in terms of the calculator rather than the calendar." 537 U.S. at 210 n.16, 123 S. Ct. at 783 n.16; Pl. Opp. at 14. Most significantly, the *Eldred* Court has already noted that enactment of the CTEA "did not create perpetual copyrights" and that "a regime of perpetual copyrights clearly is not the situation before us." 537 U.S. at 209, 210, 123 S. Ct. at 783, 784 (internal quotations omitted).

In addition, neither the Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 266 (1992) ("1992 Act") nor the CTEA alter "the traditional contours of copyright protection" – defined by copyright law's built-in traditional First Amendment accommodations – and thus require no further First Amendment scrutiny. Plaintiffs confuse changes in copyright "formalities" with changes to copyright law's built-in First Amendment accommodations that define the scope of copyright protection vis-à-vis the First Amendment. Plaintiffs have failed to establish, as required by *Eldred*, that changes to the renewal registration formality alter copyright law's built-in First Amendment accommodations; rather, Plaintiffs allege that heightened First Amendment scrutiny is required simply because "traditional" copyright formalities have changed. Because Congress' changes to the registration renewal formality do not alter copyright law's built-in First Amendment accommodations, such changes do not merit further First Amendment review as a matter of law.

ARGUMENT

I. CONGRESS HAS THE CONSTITUTIONAL AUTHORITY TO ENACT THE CHALLENGED COPYRIGHT ACTS

A. Congress Had a Rational Basis for Believing That the 1976 Act, the 1992 Act, and the BCIA Promote the Progress of Science

Defendant's Opening Memorandum demonstrated that Congress had a rational basis for believing that the Copyright Act of 1976, 17 U.S.C. § 301, *et seq.* ("1976 Act"), the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) ("BCIA"), and the 1992 Act "promote the Progress of Science" pursuant to the power granted Congress by Article I, Section 8, Clause 8 of the Constitution (the "Intellectual Property Clause" or "Copyright Clause"). Op. Mem. at 7-18. In their Opposition, Plaintiffs do not dispute that the copyright statutes they challenge would satisfy rational basis review by the Court. Instead, Plaintiffs erroneously claim that "the Supreme Court has not yet established its test for determining when a copyright enactment may fail to 'promote . . . progress.'" Pl. Opp. at 16.

Plaintiffs' contention ignores the *Eldred* decision, which unambiguously "established" that federal courts apply a *rational basis* test in determining whether copyright laws, like those Plaintiffs challenge here, fail to "promote . . . Progress." 537 U.S. at 204, 213, 123 S. Ct. at 781, 785 (holding that the justifications "for Congress' enactment of the CTEA . . . provide a rational basis for the conclusion that the CTEA 'promote[s] the Progress of Science'"); *accord Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 117 (D.D.C. 2004) (holding that Section 514 of the Uruguay Round Agreements Act ("URAA") is constitutional under the Copyright Clause because "Congress' conception of Section 514 has a rational relationship to the promotion of science"). In addition, when reviewing copyright statutes under the rational basis standard, federal courts defer substantially to Congress for its policy decisions on copyright law. *Eldred*, 537 U.S. at 212, 123 S. Ct. at 785 (citing *Stewart v. Abend*, 495 U.S. 207, 230, 110 S. Ct. 1750, 1765 (1990) ("Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces . . . it is not our role to alter the delicate balance Congress has labored to achieve."); *Sony Corp. of Am. v. Universal Studios*, 464 U.S. 417, 429, 104 S. Ct. 774, 782 (1984) ("[I]t is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product."); *Graham v. John Deere Co.*, 383 U.S. 1, 6, 86 S. Ct. 684, 688 (1966) ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.")).

Rather than contend that Congress did not have a rational basis for believing that the challenged statutes "promote the Progress of Science," Plaintiffs urge this Court to apply "heightened review" of copyright law by "requiring that any extensions be 'congruent and proportional' to proper Progress Clause ends." Pl. Opp. at 17. The *Eldred* Court, however, *already rejected* as inappropriate an identical request made by the petitioners in that case for application of the same "congruent and proportional" standard. 537 U.S. at 217-18, 123 S. Ct. at 788; *compare Eldred* Petitioners' Br. at 31 (urging the application of "heightened review" by "requiring that any extensions be 'congruent and proportional' to proper Copyright Clause ends"). As *Eldred* shows, the "congruence and proportionality" standard applies only in cases evaluating Congress' enforcement power under § 5 of the Fourteenth Amendment, not when evaluating Congress' power to define a substantive right under the Intellectual Property Clause pursuant to Article I of the Constitution. 537 U.S. at 218, 123 S. Ct. at 788. Indeed, *Eldred* correctly observed that:

> we have never applied that ["congruence and proportionality"] standard outside the § 5 context; it does not hold sway for judicial review of legislation enacted, as copyright laws are, pursuant to Article I authorization.
>
> Section 5 authorizes Congress to *enforce* commands contained in and incorporated into the Fourteenth Amendment. The Copyright Clause, in contrast, empowers Congress to *define* the scope of the substantive right. Judicial deference to such congressional definition is but a corollary to the grant to Congress of any Article I power. It would be no more appropriate for us to subject the CTEA to "congruence and proportionality" review under the Copyright Clause than it would be for us to hold the Act unconstitutional *per se*.

Id. (internal citations, quotations omitted; emphasis in original). It is equally inappropriate to apply "congruence and proportionality" review here.

Most importantly, and as described more fully in Defendant's Opening Memorandum (Op. Mem. at 7-18), Congress' enactment of the 1976 Act, the BCIA, and the 1992 Act must be upheld as constitutionally promoting the progress of science so long as they are "a rational exercise of the legislative authority conferred by the Copyright Clause." *Eldred*, 537 U.S. at 204, 123 S. Ct. at 781.[1] Here, Congress had a rational basis for believing that the 1976 Act's elimination of the renewal requirement for works created on or after January 1, 1978 – establishing a single term of copyright protection for the life of the author plus 50 years – is a rational method of promoting the progress of science. *See* 17 U.S.C. § 302 (1976 Act). Congress established this single term of copyright protection because, *inter alia*, as *Eldred* recognized, "the 1976 Act aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and

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[1] In general, statutes reviewed under the rational basis standard are accorded "a strong presumption of validity" and must be sustained "if there is any reasonably conceivable state of facts that could provide a rational basis." *Heller v. Doe*, 509 U.S. 312, 319–20, 113 S. Ct. 2637, 2642 (1993). "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . whether or not the basis has a foundation in the record." *Id.*, 509 U.S. at 320-21, 113 S. Ct. at 2643 (internal citation omitted).

Artistic Works." 537 U.S. at 195, 123 S. Ct. at 775-76. Significantly, the Supreme Court's *Eldred* decision recognized that giving U.S. authors the same copyright protection as those received by foreign authors is a rational means of "promot[ing] the Progress of Science." *Id.*, 537 U.S. at 205-06, 208, 123 S. Ct. at 781, 782. *See also* Op. Mem. at 7-13.[2]

Similarly, Congress had a rational basis for believing that the 1992 Act's changes to the renewal registration requirements would promote the progress of science. Congress amended the renewal registration provisions set forth in 17 U.S.C. § 304 to provide automatic renewal to those pre-January 1, 1978 works still in their first 28-year copyright term when the 1992 Act was enacted, *i.e.*, works that acquired a first term of copyright protection between January 1, 1964 and December 31, 1977. S. Rep. No. 102-194, at 7 (1992). By granting automatic renewal to these works, Congress gave all authors – present and future – the same protection from the "harsh consequences" of a renewal requirement. *See id.* As the *Eldred* Court recognized, "Congress could rationally seek to 'promote . . . Progress' by including in every copyright statute an express guarantee that authors would receive the benefit of any later legislative extension of the copyright term." 537 U.S. at 215, 123 S. Ct. at 786. Accordingly, Congress' enactment of the 1992 Act is a rational exercise of Congress' authority under the Intellectual Property Clause that "promote[s] the Progress of Science." *See id.*, 537 U.S. at 208, 213, 123 S. Ct. at 782-83, 785. *See also* Op. Mem. at 13-15.

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[2] Furthermore, the Ninth Circuit has upheld the constitutionality of the 1976 Act's deposit requirement, 17 U.S.C. § 407, as promoting the progress of science. *Ladd v. Law & Technology Press*, 762 F.2d 809, 814, 815 (9th Cir. 1985). The *Ladd* court held that Congress rationally exercised its Intellectual Property Clause authority in amending the deposit requirement "to produce a more effective deposit system than the present one." *Id.* at 813. In so doing, the Ninth Circuit held that the 1976 Act's deposit requirement was a rational method of furthering the Intellectual Property Clause's "purpose of promoting the public interest in the arts and sciences." *Id.* at 814, 815 ("the deposit requirement here directly

Finally, Congress had a rational basis for believing that the BCIA's changes to the notice requirement would promote the progress of science. Congress recognized that enacting the BCIA to implement Article 5(2) of the Berne Convention "will secure the highest available level of multilateral copyright protection for U.S. artists, authors and other creators." S. Rep. No. 100-352, at 2 (1988). Courts considering statutes implementing other articles of the Berne Convention have held that such enactments rationally advance the goals of the Intellectual Property Clause when they secure the protection of copyrights of U.S. citizens overseas. *Eldred*, 537 U.S. at 205-06, 123 S. Ct. at 781; *Luck's Music*, 321 F. Supp. 2d at 117.[3] Accordingly, because Congress had a rational basis for concluding that the BCIA's changes to the copyright notice provision would advance the goals of the Intellectual Property Clause, the BCIA constitutionally promotes the progress of science. *See also* Op. Mem. at 16-18.

Plaintiffs plainly disagree with Congress' policy choices in enacting the 1976 Act, the 1992 Act, and the BCIA to create an allegedly "unconditional" copyright scheme, and Plaintiffs repeatedly state in their Opposition that they will establish "at trial" that maintaining a "conditional" copyright policy would better "promote . . . Progress." Plaintiffs' policy challenges are unavailing, however, because as *Eldred* made clear, so long as Congress had a rational basis for believing that the challenged copyright statutes "promote . . . Progress," "we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be." *Eldred*, 537 U.S. at 208. This

furthers the purpose of promoting arts and sciences by adding to the collection of our national library"). *See also* Op. Mem. at 12-13.

[3] Independent of its status as an exercise of Congress' copyright power, and as discussed more fully in Defendant's Opening Memorandum, the BCIA is also a valid exercise of Congress' constitutional power to implement treaties. *See* Op. Mem. at 18 n.11.

Court's role is only to ensure that Congress *could have* rationally believed that the challenged statutes would promote scientific progress. Given the deferential standard of review under the rational-basis test, the challenged statutes plainly satisfy that standard and therefore must be upheld as constitutionally promoting the progress of science because they are a rational exercise of the legislative authority conferred by the Copyright Clause. Accordingly, Plaintiffs' "Progress Clause" claim should be dismissed. *Eldred*, 537 U.S. at 204-18 (rejecting "Progress Clause" challenge to CTEA as a matter of law because CTEA constitutionally promotes progress of science under rational basis test); *Luck's Music*, 321 F. Supp. 2d at 113, 117 (dismissing "Progress Clause" challenge to URAA for failure to state a claim because URAA constitutionally promotes progress under rational basis test).

B. The CTEA and the 1992 Act Do Not Violate the "limited Times" Clause

As noted in Defendant's Opening Memorandum, the Supreme Court already held that a term of copyright protection for the life of the author plus 70 years, as enacted by the CTEA, is a term for a "limited" time that does not violate the Intellectual Property Clause. *Eldred*, 537 U.S. at 204, 123 S. Ct. at 781. Plaintiffs allege that the CTEA's basic copyright term exceeds the "limited Times" allowed by the Intellectual Property Clause because the term is "so long as to be effectively perpetual." Am. Compl. ¶¶ 93-104, 98, 101, 103. Plaintiffs' contention is based solely on the erroneous legal theory that a copyright term is measured as a matter of law by the *economic value* of a work after the copyright term expires, not by the *time* it takes for the term to expire.

The Supreme Court rejected this theory in *Eldred* and indicated that "[i]t is doubtful, however, that those architects of our Nation, in framing the 'limited Times' prescription, thought in terms of the calculator rather than the calendar." 537 U.S. at 209 n.16, 123 S. Ct. at 783 n.16; Pl. Opp. at 14. Plaintiffs concede that "the Court's view" does not support their theory, but they nevertheless present it because they believe that the *Eldred* Court's view is dicta. Pl. Opp. at 14. If "the Court's view" is dicta, it is especially valuable dicta here because it was presented in the context of rejecting Justice Breyer's dissent – which adopted the very position that Plaintiffs seek to advance here. *See Eldred*, 537 U.S. at 199 n.4, 123 S. Ct. at 778, n.4 (further criticizing Justice Breyer's dissent as having "precious little support from precedent"). As the Seventh Circuit held with respect to Supreme Court dicta:

> Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. . . . If the Justices are just pulling our leg, let them say so.

Sherman v. Community Consolidated School Dist., 980 F.2d 437, 448 (7th Cir. 1992) (Easterbrook, J.). Indeed, at least one court has held that *Eldred* forecloses the argument that the CTEA is "effectively or virtually perpetual" in violation of the "limited Times" provision. *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1218 (D. Colo. 2004) (holding that plaintiffs' "effectively perpetual" argument "is foreclosed by the *Eldred* decision" and thus should be dismissed for failure to state a claim).

The current copyright term of the author's life plus 70 years is not *per se* a perpetual copyright term. Indeed, *Eldred* noted that the copyright extensions enacted in 1831, 1909, and 1976 "did not create perpetual copyrights, and neither does the CTEA" and that "a regime of perpetual copyrights clearly is not the situation before us." 537 U.S. at 209, 210, 123 S. Ct. at 783, 784 (internal quotations omitted). The *Eldred* Court further concluded that Congress had a rational basis for believing that setting the copyright term at the author's life plus 70 years "promotes . . . Progress" pursuant to the Copyright Clause. 537 U.S. at 213, 123 S. Ct. at 785. Defendant respectfully submits that *Eldred*'s conclusion, and the deference due Congress' policy decisions pursuant to its Copyright Clause authority, foreclose Plaintiffs' claim that the CTEA's term is "effectively perpetual." Accordingly, the CTEA's establishment of a copyright term for the life of the author plus 70 years is a term for a limited period that does not violate the "limited Times" provision of the Intellectual Property Clause, and Plaintiffs' claim should be dismissed. *See Eldred*, 537 U.S. at 199-200, 123 S. Ct. at 778 (holding that "there is no cause to suspect that a purpose to evade the 'limited Times' prescription prompted Congress to adopt the CTEA"); *accord Golan*, 310 F. Supp. 2d at 1218 (holding that the CTEA's term is not "effectively or virtually perpetual").

C. Plaintiffs Lack Standing to Challenge the Constitutionality of the 1976 Act and the BCIA

Plaintiffs lack standing to challenge the constitutionality of the 1976 Act and the BCIA because they have not alleged facts placing them within the "zone of interests" protected by these statutes. *See Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 830 (1970) (a plaintiff must allege that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

As noted in Defendant's Opening Memorandum (Op. Mem. at 18 n.12), Plaintiffs allege, as their basis for standing, that four copyright statutes unconstitutionally preclude Plaintiffs from posting on the Internet "works created between 1964 and 1978." Am. Compl. ¶¶ 1, 8, 68 ("It is works first published on or after January 1, 1964 but before January 1, 1978, that are the focus of this action."). At the same time, however, Plaintiffs concede that the 1976 Act's changes to the deposit and renewal requirements only apply to "works created on or *after* January 1, 1978." *Id.* ¶ 47 (emphasis added). Plaintiffs also concede that the BCIA's changes to the notice requirement challenged by Plaintiffs "prospectively eliminated the notice requirement" – *i.e.*, only applying to works first published *after* March 1, 1989. *See id.* ¶ 48. Thus, Plaintiffs have not alleged facts in their Amended Complaint establishing that they are within the "zone of interests" of the 1976 Act and BCIA.

In their Opposition, Plaintiffs contend that they "are also seeking access to works affected by the 1976 Act and the BCIA" for posting on the Internet – *i.e.*, works created after January 1, 1978 and after March 1, 1989. Pl. Opp. at 10 n.6. Even if Plaintiffs had made this allegation in their First Amended Complaint, Plaintiffs' alleged interest in such works is belied, however, by the consequences of invalidating the 1976 Act – namely, a return to an initial 28-year copyright term pursuant to the Act of March 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1075, 1080-81 ("1909 Act"). *See* Am. Compl. ¶¶ 38-39, 56-57. Under the 1909 Act, works created after January 1, 1978 could not enter the public domain (and become available for posting on the Internet by Plaintiffs) until, at the earliest, 2006 – the end of the initial 28-year term. Clearly, Plaintiffs are not challenging the constitutionality of the 1909 Act; in fact, Plaintiffs' lawsuit is designed to return copyright law to the conditional copyright regime as reflected by the 1909 Act. *Cf.* Am. Compl. ¶ 39. Accordingly, the fact that Plaintiffs would *still* be unable to post on the Internet works created after January 1, 1978, even if the 1976 Act and the BCIA were invalidated under Plaintiffs' theory of the case, clearly demonstrates that Plaintiffs have failed to allege facts establishing that they have standing to challenge the 1976 Act.

II. THE CTEA AND THE 1992 ACT DO NOT VIOLATE THE FIRST AMENDMENT

Neither the CTEA nor the 1992 Act violate the First Amendment because it is undisputed that they do not alter the "contours of copyright protection" – defined by copyright law's built-in First Amendment accommodations – and thus require no further First Amendment scrutiny as a matter of law. Plaintiffs allege that the CTEA and the 1992 Act violate the First Amendment because the 1992 Act "automatically renewed" the 1976 Act's copyright term, and the CTEA "unconditionally extended" that term by 20 years without conditioning such renewals on "traditional" formalities such as registration and notice. *E.g.*

Am. Compl. ¶¶ 86, 90. Plaintiffs contend that *Eldred* set "a baseline tied to tradition" and therefore any change by Congress to something "traditional" in copyright – even a formality such as a change in the renewal registration requirement – requires heightened First Amendment review. *E.g.* Pl. Opp. at 8-9. Plaintiffs' unsupported position, in essence, is that whenever Congress changes a "traditional" formality, like renewal registration, that change is categorically subject to First Amendment review – regardless of whether the new enactment affects the "contours of copyright protection" as traditionally defined by copyright's built-in First Amendment safeguards.

Plaintiffs' tradition-based argument both misconstrues *Eldred* and ignores the unique constitutional relationship between copyright and free speech. The Copyright Clause and the First Amendment were adopted close in time, and the Supreme Court has long recognized that "[t]his proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles." *Eldred*, 537 U.S. at 219, 123 S. Ct. at 788. Thus, the Supreme Court's "baseline" for analyzing copyright laws under the First Amendment is that they are *not* typically subject to First Amendment review because copyright laws "promote," rather than threaten, free expression. "[C]opyright supplies the economic incentive to create and disseminate ideas," *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558, 105 S. Ct. 2218, 2229 (1985), and "protects authors' original expression from unrestricted exploitation." *Eldred*, 537 U.S. at 221, 123 S. Ct. at 789. Thus, by offering an economic incentive, "the Framers intended copyright itself to be the engine of free expression." *Harper & Row*, 471 U.S. at 558, 105 S. Ct. at 2229; *Eldred*, 537 U.S. at 219, 123 S. Ct. at 788 (holding that "copyright's purpose is to *promote* the creation and publication of free expression") (emphasis in original).

As discussed in Defendant's Opening Memorandum (Op. Mem. at 21-24), in addition to promoting free expression, the Supreme Court has recognized that copyright law already contains "built-in free speech accommodations;" in particular, the "idea/expression dichotomy" and the "fair use" doctrine. *Eldred*, 537 U.S. at 219-21, 123 S. Ct. at 788-89. Such "traditional First Amendment safeguards" are what define the contours of copyright protection vis-à-vis the First Amendment. *See id.* Specifically, the idea/expression distinction limits the scope of copyright's protection only to original expression, not to ideas, theories or facts. *Id.*, 537 U.S. at 219, 123 S. Ct. at 788-89. Similarly, "the 'fair use' defense allows the public to use not only the facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances . . . for purposes such as criticsm[or] comment." *Id.*, 537 U.S. at 219-20, 123 S. Ct. at 789.[4]

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[4] Plaintiffs admit that the Supreme Court has only identified the "idea/expression distinction" and the fair use doctrine as "traditional First Amendment safeguards" built into copyright law. Although Plaintiffs contend that there are other "traditional contours" of copyright law, *e.g.*, Pl. Opp. at 7-10, they concede that the Supreme Court has not recognized any other "traditional First Amendment safeguards." Most significantly, the Supreme Court has not recognized a cause of action for a First Amendment challenge to a content neutral copyright law that does *not* change the traditional contours of copyright *protection* vis-à-vis the First Amendment as defined by copyright's built-in "traditional First Amendment safeguards."

In addition, Plaintiffs' examples of other "traditional contours" of copyright law that they contend merit First Amendment scrutiny are either inapposite or are already within the scope of either the fair use doctrine or the idea/expression distinction. For instance, Plaintiffs contend that a "copyright system that extended protection to mere facts . . . implicates neither 'fair use' nor the 'idea/expression' distinction." Pl. Opp. at 8. This statement is incorrect. As the Supreme Court has repeatedly held, the "'idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of *facts* while still protecting an author's expression.' Due to this distinction, every idea, theory, and *fact* in a copyrighted work becomes instantly available for public exploitation at the moment of publication." *Eldred*, 537 U.S. at 219, 123 S. Ct. at 789 (emphasis added) (quoting *Harper & Row*, 471 U.S. at 556, 105 S. Ct. at 2228; citing *Feist Publ's, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50, 111 S. Ct. 1282, 1289 (1991)). In other words, copyright protection does not extend to facts contained in a copyrighted work precisely because it would implicate (and violate) the idea/expression distinction.

Thus, where, as here, Plaintiffs claim the right under the First Amendment "to make other people's speeches" in a way that would otherwise violate copyright law, the Supreme Court typically will not recognize a cause of action based on such "First Amendment concerns" because "copyright's built-in free speech safeguards are generally adequate to address them." *Eldred*, 537 U.S. at 221, 123 S. Ct. at 789. Congress does not alter the traditional contours of copyright protection, and no First Amendment scrutiny is required, if it does not weaken copyright law's built-in First Amendment safeguards such as the idea/expression dichotomy or the fair-use doctrine. *E.g., Eldred*, 537 U.S. at 221, 123 S. Ct. at 790; *Luck's Music*, 321 F. Supp. 2d at 119 ("Congress has not altered the traditional contours of copyright protection . . . [because] by enacting Section 514 [of the URAA] . . . does not alter First Amendment accommodations such as the idea/expression dichotomy or the fair-use doctrine.") (internal citations omitted).

For example, the *Eldred* Court has already held that the CTEA does not violate the First Amendment because the CTEA has not altered copyright law's built-in First Amendment safeguards by either extending the scope of copyright protection beyond original expression or by limiting the scope of fair use. If anything, *Eldred* found that "the CTEA itself supplements these traditional First Amendment safeguards." *Eldred*, 537 U.S. at 220, 123 S. Ct. at 789. As a result, *Eldred* held that the CTEA "has not altered the traditional

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Plaintiffs contend that a content-based copyright statute seeking to extend copyright protection based on the idea being expressed in a copyrighted work would receive heightened First Amendment scrutiny without implicating fair use or the idea/expression distinction. *See* Pl. Opp. at 9. However, Plaintiffs' observation is irrelevant here because when the Supreme Court in *Eldred* was considering whether First Amendment scrutiny was necessary, it was expressly considering a challenge to a "content neutral regulation of speech" (the CTEA), not a statute discriminating on the basis of content. *Eldred*, 537 U.S. at 218, 123 S. Ct. at 788. Similarly, it is undisputed that the statutes that Plaintiffs challenge here as violating the First Amendment, the CTEA and the 1992 Act, are both content neutral statutes.

contours of copyright protection" – thereby squarely rejecting Plaintiffs' claim here that the CTEA violates the First Amendment. 537 U.S. at 221, 123 S. Ct. at 790.

Like the CTEA, the 1992 Act's automatic renewal provision does not alter copyright's "traditional contours of copyright protection" because it does not undermine any of copyright law's built-in "traditional First Amendment safeguards." Plaintiffs concede that the 1992 Act does not redefine or in any way affect the idea/expression dichotomy. Similarly, Plaintiffs concede that the 1992 Act does not narrow or change the scope of the "fair use" doctrine. In fact, like the CTEA and other copyright laws, the 1992 Act "supplements these traditional First Amendment safeguards" because it "protects authors' original expression from unrestricted exploitation" by giving all authors – present and future – the same protection from the "harsh consequences" of losing their works "irretrievably into the public domain" for failing to satisfy a renewal registration formality. S. Rep. No. 102-194, at 7; *see also Eldred*, 537 U.S. at 220, 221, 123 S. Ct. at 789.[5] "Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas." *Eldred*, 537 U.S. at 221, 123 S. Ct. at 789.

In their Opposition, Plaintiffs confuse changes to "traditional" copyright *formalities* with changes to copyright's built-in "traditional First Amendment safeguards" that define the scope of copyright protection. *Cf. Eldred* 537 U.S. at 220, 123 S. Ct. at 789. Plaintiffs contend broadly that "changes to the U.S. copyright system at issue in this case profoundly affect copyright's 'traditional contours.'" Pl. Opp. at 1. Yet, Plaintiffs fail to establish that, as a matter of law, changes to "traditional" copyright *formalities* constitute changes to the

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[5] Indeed, the Supreme Court observed not only that Congress' "consistent placement of existing copyright holders in parity with future copyright holders" is constitutional but that nothing in the Constitution prevents Congress from "including in every copyright statute an

"contours of copyright *protection*." In the same vein, Plaintiffs fail to establish, as they must as a matter of law, that the 1992 Act's changes to a copyright renewal *formality* constitute changes to any of copyright's "traditional First Amendment safeguards" that define the "traditional contours of copyright protection." Most importantly, Plaintiffs offer no authority for the proposition that there exists a cause of action under the First Amendment challenging changes to copyright law that do *not* alter copyright law's built-in "traditional First Amendment safeguards." Indeed, *Eldred* forecloses such a cause of action by precluding First Amendment review of copyright laws *unless* Congress changes a "traditional First Amendment safeguard" that defines the "contours of copyright protection" vis-à-vis the First Amendment. *Eldred*, 537 U.S. at 220, 221, 123 S. Ct. at 789-90.[6]

Because Plaintiffs have failed to establish as a matter of law that either the 1992 Act or the CTEA have altered the "contours of copyright law" by weakening copyright's built-in "traditional First Amendment safeguards," First Amendment review is neither required nor appropriate. *Eldred*, 537 U.S. at 790, 123 S. Ct. at 221; *Luck's Music*, 321 F. Supp. 2d at 119. Thus, Plaintiffs have failed to state a cause of action challenging those statutes under the First Amendment. *Id.* Accordingly, as the Supreme Court already did with respect to the CTEA in *Eldred*, this Court should "reject petitioners' plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and

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express guarantee that authors would receive the benefit of any later legislative extension of the copyright term." *Eldred*, 537 U.S. at 215, 123 S. Ct. at 786.

[6] Plaintiffs similarly fail to address how, as a matter of law, a change from a conditional copyright regime to an unconditional or voluntary one affects free speech in a way that constitutes a cognizable cause of action under the First Amendment. In fact, the conditional/unconditional line that Plaintiffs draw does not alter or affect in any way the built-in First Amendment accommodations that the Supreme Court has held define "the traditional contours of copyright protection." *Cf. Eldred*, 537 U.S. at 218 n.23, 123 S. Ct. at 788 n.23 (holding that "the petitioners do not explain how their First Amendment argument is moored to the prospective/retrospective line they urge us to draw").

safeguards" because neither the CTEA nor the 1992 Act encroach on the traditional contours of copyright protections. *Eldred*, 537 U.S. at 218-19; 123 S. Ct. at 788-90 (affirming rejection of First Amendment challenge to the CTEA pursuant to Rule 12(c)); *accord Luck's Music*, 321 F. Supp. 2d at 118-19 (dismissing First Amendment challenge to Section 514 of the URAA pursuant to Rule 12(b)(6) because "Congress has not altered the traditional contours of copyright protection by enacting Section 514.").

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Amended Complaint should be dismissed pursuant to Rule 12(b)(6).

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Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KEVIN V. RYAN
United States Attorney

JOANN SWANSON
Chief, Civil Division

OWEN MARTIKAN
Assistant United States Attorney

/s/ John H. Zacharia
VINCENT M. GARVEY
JOHN H. ZACHARIA
Attorneys, Department of Justice
20 Massachusetts Ave., N.W., 7th Floor
Washington, D.C. 20530
Tel.: (202) 305-2310; Fax: (202) 616-8470
E-mail: john.zacharia@usdoj.gov
Attorneys for Defendant